04

Supreme Court, U.S.
FILED

(1)

08-170 AUG 11 2008

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

AIRMAN ANTONYO T. ADAMS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

---

PETITION FOR WRIT OF CERTIORARI

Anthony D. Ortiz
Captain, U.S. Air Force
Counsel of Record

Tiffany M. Wagner
Captain, U.S. Air Force

Shannon A. Bennett
Major, U.S. Air Force

Air Force Appellate
Defense Division
112 Luke Ave, Ste 343
Bolling AFB, DC 20032
(202) 767-1562

QUESTION PRESENTED

In *McClaughry v. Deming*, 186 U.S. 49 (1902), this Court recognized the importance of statutory construction of a court-martial as an essential component for jurisdiction, stressing that a court-martial may only have jurisdiction if it is convened and constituted in entire conformity with the provisions of the statute. Here, the final convening order unequivocally states that the general court-martial would be constituted with only the five members listed on the final order. However, members on prior orders were seated in the court-martial in direct violation of 10 U.S.C. § 825 and Rule for Courts-Martial 504. Does a court-martial have jurisdiction when members of the court-martial panel were not properly constituted to the court by the final convening order?

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii-iv
OPINIONS BELOW.....1
JURISDICTION.....1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 1-3
STATEMENT OF THE CASE..... 4-6
REASONS FOR GRANTING THE WRIT. 6-7

CONTRARY TO 10 U.S.C. § 825, AND *MCCLAUGHRY v. DEMING*, 186 U.S. 49 (1902), THE COURT OF APPEALS FOR THE ARMED FORCES FOUND THAT SEATING MEMBERS NOT CONSTITUTED TO THE COURT-MARTIAL BY THE CONVENING AUTHORITY IN THE FINAL CONVENING ORDER WAS AN ADMINISTRATIVE ERROR SUGGESTING THAT AMBIGUOUS CONVENING ORDERS NOT ABIDING BY STATUTE ARE NOT JURISDICTIONAL ISSUES.

..... 7
CONCLUSION..... 17
APPENDIX.....1a

TABLE OF AUTHORITIES

Supreme Court of the United States Cases

Bowles v. Russell,
127 S. Ct. 2360 (2007) 6
McClaughry v. Deming,
186 U.S. 49 (1902) 6,7,8,9,10,13,14,15
Runkle v. United States,
122 U.S. 543 (1887) 11,16

United States Court of Appeals Cases

United States v. Adams,
66 M.J. 255 (C.A.A.F. 2008) 1
United States v. Adams,
ACM 36226 (A.F. Ct. Crim. App. 20 June 2007)
..... 1
United States v. Mack,
58 M.J. 413 (C.A.A.F. 2003) 7,8,9.15
United States v. Padilla,
5 C.M.R. 31 (C.M.A. 1952) 11
United States v. Wilson
65 M.J. 140 (C.A.A.F. 2007) 9

Federal Statutes

10 U.S.C. § 825..... 1,2,3,11
10 U.S.C. § 867a(a)..... 1
28 U.S.C. § 1259..... 1

Miscellaneous

Air Force Instruction 51-201 12-13
Rule for Courts-Martial 503 12-13
Rule for Courts-Martial 504 11-12

The Petitioner, Airman Antonyo T. Adams, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on May 13, 2008.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, *United States v. Adams,* 66 M.J. 255 (C.A.A.F. 2008), is located at Appendix (App.) 1a. The order and judgment of the United States Air Force Court of Criminal Appeals, *United States v. Adams,* ACM 36226 (A.F. Ct. Crim. App. 20 June 2007), is located at App. 19a.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on May 13, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (2000) and 10 U.S.C. § 867a(a) (2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

10 U.S.C. § 825 (2000) provides:

Who may serve on courts-martial

(a) Any commissioned officer on active duty is eligible to serve on all courts-martial for the trial

of any person who may lawfully be brought before such courts for trial.

(b) Any warrant officer on active duty is eligible to serve on general and special courts-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such courts for trial.

(c) (1) Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the conclusion of a session called by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed

written statement, to be appended to the record, stating why they could not be obtained.

(2) In this article, "unit" means any regularly organized body as defined by the Secretary concerned, but in no case may it be a body larger than a company, squadron, ship's crew, or body corresponding to one of them.

(d) (1) When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.

(2) When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

(e) Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case. Under such regulations as the Secretary concerned may prescribe, the convening authority may delegate his authority under this subsection to his staff judge advocate or legal officer or to any other principal assistant.

STATEMENT OF THE CASE

In this case, the general court-martial convening authority unsuccessfully convened Petitioner's general court-martial when he did not clearly and unequivocally transfer adequate members to establish jurisdiction under 10 U.S.C. § 825.

Petitioner was charged with rape, use of marijuana, absence without leave, and the utterance of several worthless checks. Prior to his court-martial, the general court-martial convening authority appointed officer and enlisted members to act as Petitioner's court-martial panel on the following orders: Special Orders AB-1, AB-7, and AB-9.

After voir dire and challenges to members, the court-martial panel fell to four members, which is below the required quorum under 10 U.S.C. § 825. As a result, the judge ordered a recess in the proceedings to obtain new members.

The convening authority issued a new order, Special Order Number AB-12 dated 15 December 2004, which stated that "[t]he court will be constituted as follows:" and listed only five officer members not included on the prior orders. Special Order AB-12 also read:

> All cases referred to the general court-martial convened by Special Order AB-1, this headquarters, dated 8 October 2004, as amended by Special Order AB-7, this headquarters, dated 24 November 2004,

> and Special Order AB-9, this headquarters, dated 8 December 2004, in which the court has been assembled will be brought to trial before the court hereby convened.

After a new voir dire proceeding with only the members listed on AB-12, seven members sat on Petitioner's court-martial. Only three of the members listed by Special Order AB-12 actually sat on Petitioner's court-martial. The remaining members were officer and enlisted members appointed by the prior convening orders. There was no challenge by trial defense counsel to jurisdiction or the composition of Petitioner's court-martial panel.

The Air Force Court of Criminal Appeals, determined, among other things, whether the court-martial had proper jurisdiction when Special Order AB-12 did not transfer members from the prior orders, but these members nonetheless sat on Petitioner's court-martial. App. 18a-36a. After consideration of the issue, the Air Force court affirmed Petitioner's court-martial. The court held that all parties considered Special Order AB-12 a third amending order and not an order constituting a new court. The Air Force court determined if, in the end, the Petitioner still received a fair trial. Despite the administrative errors that occurred in this case, the court found that the Petitioner was not prejudiced by these mistakes and received a fair trial.

The Court of Appeals for the Armed Forces granted review of the case to determine whether Petitioner's court-martial had proper jurisdiction when Special Order AB-12 did not transfer members appointed by the prior orders. App. 1a-17a. The court held that there was no jurisdictional defect in the composition of Petitioner's court-martial. Each of the members not listed on the final order was selected by the convening authority and there was no evidence that the convening authority excused them from Petitioner's court-martial. Additionally, the court concluded that there was no evidence the convening authority withdrew the charges in order to refer them to a new court-martial. The court also reasoned that the language of Special Order AB-12 citing to the prior court-martial orders demonstrated that the five members were selected only to bring the court-martial to quorum.

The lower courts did not directly address this Court's ruling in *McClaughry v. Deming*, 186 U.S. 49 (1902).

REASONS FOR GRANTING THE WRIT

This Honorable Court should grant this petition to enforce its prior holding in *McClaughry v. Deming*, 186 U.S. 49 (1902), which requires a clear and unequivocal establishment of jurisdiction in order to create a court-martial. The lower courts' decisions are in direct contravention to the express holding of this Court.

Additionally, the importance of compliance with statutory provisions in relation to jurisdiction has been stressed by this Honorable Court. Recently, in *Bowles v. Russell*, 127 S. Ct. 2360 (2007), this Honorable Court held that statutorily set time limits must be strictly complied in order to establish jurisdiction. This Honorable Court has recognized and strictly construed jurisdictional statutory compliance. As noted in *McClaughry*, a court-martial is a creature of statute and must be convened in conformity with the provisions of the statute or there is no jurisdiction. *McClaughry*, 186 U.S. at 62.

CONTRARY TO 10 U.S.C. § 825, AND *MCCLAUGHRY v. DEMING*, 186 U.S. 49 (1902), THE COURT OF APPEALS FOR THE ARMED FORCES FOUND THAT SEATING MEMBERS NOT CONSTITUTED TO THE COURT-MARTIAL BY THE CONVENING AUTHORITY IN THE FINAL CONVENING ORDER WAS AN ADMINISTRATIVE ERROR SUGGESTING THAT AMBIGUOUS CONVENING ORDERS NOT ABIDING BY STATUTE ARE NOT JURISDICTIONAL ISSUES.

Only members who are detailed to a specific court-martial may serve on that court-martial panel. *United States v. Mack*, 58 M.J. 413, 416 (C.A.A.F. 2003). "When the convening orders and the record make it clear that an individual who served on a

court-martial panel was never detailed to do so, [the Court of Appeals for the Armed Forces] has held that the court-martial was improperly constituted and the findings must be set aside." *Id.* at 416 (citing *United States v. Harnish*, 31 C.M.R. (C.M.A. 1961)).

"When the record reflects an ambiguity as to whether an individual was detailed to serve at a particular court-martial, we look to the intent of the convening authority with respect to service of that member on that court-martial panel." *United States v. Mack*, 58 M.J. 413 (C.A.A.F. 2003) (citing *United States v. Padilla*, 5 C.M.R. 31 (C.M.A. 1952)). If there is an ambiguity but no evidence that the convening authority's intent was to the contrary, "the construction of the convening orders by the participants of [the] trial is controlling." *Id.* (quoting *United States v. Gebhart*, 34 M.J. 189, 193 (C.M.A. 1992)).

In *McClaughry v. Deming*, 186 U.S. 49 (1902), Captain Deming's court-martial was constituted in direct violation of a statute and, as a result, the court-martial had no effect. Although Captain Deming was an officer of the Volunteer Army of the United States, created during the Spanish-American War, he was court-martialed by a panel composed of Regular army officers. *Id.* at 53-54. Under the Articles of War then in effect, officers of the Regular Army were not competent to sit on courts-martial to try the officers or soldiers of other forces. *Id.* at 54.

In determining the jurisdictional question, this Court stressed the importance of statutory

construction. "A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction." *Id.* at 62. This Court questioned jurisdiction of a court-martial "which is composed of officers incompetent to sit on such court; of officers who are placed there in direct and plain violation of the act of Congress[.]" *Id.* at 63. In essence, courts-martial that do not conform to their statutory requirements are "contrary to and in complete violation of law." *Id.* at 64.

There is no ambiguity concerning the appointment of the court-martial that tried Petitioner; it was to consist only of the five members named in Special Order AB-12. Special Order AB-12 does reference Special Orders AB-1, AB-7, and AB-9 and notes that "[a]ll cases referred to the general court-martial . . . in which the court has been assembled, will be brought to trial before the court hereby convened." However, AB-12 unequivocally states "[t]he court will be constituted as follows:" and lists only five members.

The explicit language of AB-12 only lists five members and does not incorporate members listed on other orders associated with Petitioner's court-martial. Thus, there was no ambiguity in the final order. The remedy in this case has been well-established – the court is improperly convened and must be set aside. *See Mack*, 58 M.J. at 416.

Similarly, the Court of Appeals for the Armed Forces has previously emphasized the importance of strict construction of the convening authority's language in regards to the convening authority's action. In *United States v. Wilson*, 65 M.J. 140 (C.A.A.F. 2007), the majority noted, "[W]hen the plain language of the convening authority's action is facially complete and unambiguous, its meaning must be given effect." 65 M.J. at 141. In the present case, the language of AB-12 is complete and unambiguous – five members were detailed to sit on Petitioner's court-martial. As such, this unambiguous meaning must be given effect.

Assuming *arguendo* that AB-12 is read as an attempt to incorporate prior orders, it fails for two reasons: 1) it does not affirmatively or unequivocally state whom the members are; and 2) it fails to follow statutory and procedural requirements for convening a general court-martial. This Court's precedent establishes the consequences of such defects – a finding of no jurisdiction. *See McClaughry supra.*

The government cannot make an affirmative showing that the convening authority transferred the remaining members from orders from AB-01, AB-07, and AB-09 by the final convening order. The court-martial, therefore, had no jurisdiction because such a transference cannot be presumed. As this Court has emphasized, to give effect to a court-martial's sentence, "it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been

complied with, and that its sentence was conformable to law. *McClaughry v. Deming*, 186 U.S. at 63 (quoting *Runkle v. United States*, 122 U.S. 543, 556 (1887)). Crucially, this Court then observed, "There are no presumptions in its favor, so far as these matters are concerned." *Id.*

Thus, AB-12 must be relied upon by the face of the document itself. In *Runkle v. United States*, this Court relied primarily on a facial analysis of the text of the order to determine if the President acted upon Major Runkle's court-martial. *Runkle*, 122 U.S. at 558-60. In particular, this Court observed that the order was signed by the Secretary of War alone, and the personal action of the President in the matter was not mentioned, except in the remission of a part of the sentence. *Id.* at 559. Nothing in the order was "an affirmative statement that 'the whole proceedings' had been laid before him for action, or that he personally approved the sentence." *Id.* at 559. In the present case, nothing in AB-12 was an affirmative statement that transferred members from preceding orders to Petitioner's court-martial. As this Court has held, jurisdiction cannot be presumed absent this affirmative statement.

Finally, AB-12 fails to properly convene Petitioner's court-martial because it did not comply with governing statute and regulations. The responsibility for the composition of a court-martial panel rests with the convening authority. *Mack*, 58 M.J. at 416; Art. 25, UCMJ, 10 U.S.C. § 825 (2000). The members of a court-martial panel are detailed for such service by the convening authority. Article

25(b)(d)(2) requires that the convening authority "shall detail ... members." Rule for Courts-Martial (RCM) 504(d)(1) provides that the convening order "shall designate the type of court-martial and detail the members and may designate where the court-martial will meet." Further, RCM 504 clearly states that a court-martial is created by a convening order of the convening authority and is a power that cannot be delegated. RCM 504(a)(b)(4).

RCM 503 allows an enlisted accused to request enlisted persons to serve on his or her court-martial. If a request is made, an enlisted accused may not be tried by a panel that does not include at least one-third enlisted members unless eligible enlisted members cannot be obtained because of physical conditions or military exigencies. *Id.* If the appropriate number cannot be obtained, the trial may proceed, but the convening authority "shall make a detailed written explanation why enlisted members could not be obtained which must be appended to the record of trial." *Id.*

Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, dated 26 November 2003, prescribes rules for convening orders:

> Paragraph 5.8.1. Generally. Prepare convening orders in accordance with RCM 504, 1302, and this chapter. Authenticate convening orders according to this instruction . . . . Avoid publishing several amending orders to

> the initial convening order. Avoid oral amendments, unless absolutely necessary, and ensure they are confirmed by written orders. Generally, issue no more than two amendments to the original order. If it is necessary to further amend the convening order, publish a new order convening the court-martial and transfer all cases in which the court has not yet been assembled to the new order. Convening orders must cite all orders amending the convening order. An appointing order containing a savings clause is not an amending order.
>
> 5.8.3. Identification of Members. Special orders convening a court-martial should contain the name, rank, and unit of all persons detailed . . . .

(internal citations omitted) (internal emphasis omitted).

Statutory and regulatory procedural requirements mandate that the convening authority or his delegate specifically state the members convened for a court-martial. In this case, assuming the convening authority wanted members listed on prior orders to sit on Petitioner's court-martial, AB-12 was required to expressly incorporate these members. It did not. If seating the prior members was error, then the convening authority thus also failed to acquire enlisted members or append to the

record of trial an explanation for this failure, as required by RCM 503.

In *McClaughry*, this Court emphasized that a court-martial is a mere creature of the statute and must be created under its provisions. *McClaughry*, 186 U.S. at 63-64. It is a special body convened for a specific purpose, and when that purpose is accomplished, its duties are concluded and the court is dissolved. *Id.* at 63. It has no continuous existence, but under the provisions of the statute it is called into being by the proper officer, who constitutes the court itself by the very act of appointing its members. *Id.* If the law governing its creation was violated, then the court-martial lacked the necessary statutory authority for its existence. Therefore it lacked jurisdiction over the defendant or the subject-matter of the charges against him. *Id.* at 65.

In the present case, it cannot be assumed that Special Order AB-12 attempted to incorporate other members. On the contrary, any such assumption would offend Supreme Court case law. Because the court-martial did not comply with the order that established it, it "acted contrary to and in complete violation of law." *McClaughry*, 186 U.S. at 64.

The government cannot rely upon the actions of the parties at Petitioner's court-martial to gain jurisdiction. Under the express language of this Honorable Court:

> It is difficult for us to understand how an ephemeral court, composed of men detailed as members, each one of whom is so detailed in direct violation of the statute on that subject which prohibits their sitting, can obtain any jurisdiction over the subject-matter or person even by the consent of the defendant. In those cases where the judgment rendered by a disqualified judge was held free from attack because of a waiver, it can at least be said there was a valid court for other purposes than the trial or hearing of the particular case, and that the objection was simply a personal one, and should be made before the trial or it must be deemed waived. We are not inclined to that view, but the principle is not applicable to this case where the court is created and all the members of it are convened in total disregard and violation of the statutes upon the subject of its membership.

McClaughry, 186 U.S. at 68. Given this language, the construction of the convening orders by the participants at trial is not controlling. *See Mack supra*. The main consideration is whether AB-12 complied with relevant statutes and rules.

The prejudice in this case is clear. Jurisdiction never attached in this case. AB-12 appoints only five members to sit on Petitioner's court-martial. Two of

these members were eliminated through voir dire. Four members not listed on AB-12 sat on Petitioner's court-martial panel. Petitioner requested a panel of officer and enlisted members. R. 8. The court-martial failed to comply with statutory requirements governing its creation, quorum, and composition.

These failings are not *de minimis*. Statutory requirements must be followed. As this Honorable Court noted in *Runkle*:

> The trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged according to law.

122 U.S. at 558.

Petitioner has a right to have the "sacred questions" of his guilt or innocence determined and, if the former, punishment determined by lawfully empaneled members. Because his court-martial was not "organized . . . under the authority of and according to the prescribed forms of law," he was not "adjudged according to law." *Id.* His findings and sentence must, therefore, be set aside.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant his petition for a writ of certiorari.

Respectfully submitted,

ANTHONY D. ORTIZ
Captain, U.S. Air Force
Counsel of Record

TIFFANY M. WAGNER
Captain, U.S. Air Force

SHANNON A. BENNETT
Major, U.S. Air Force

AF Legal Operations Agency
Appellate Defense Division
112 Luke Ave, Ste 343
Bolling AFB, DC 20332-8000
(202) 767-1562

Counsel for Petitioner

UNITED STATES, Appellee
v.

Antonyo T. ADAMS, Airman

U.S. Air Force, Appellant

UNITED STATES
COURT OF APPEALS FOR
THE ARMED FORCES

66 M.J. 255

February 5, 2008, Argued

May 13, 2008, Decided

OPINION BY: EFFRON

OPINION

Chief Judge EFFRON delivered the opinion of the Court.

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of being absent without leave and three specifications of dishonorably failing to maintain sufficient funds for payment of checks, in violation of Articles 86 and134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 886, 934

(2000). The sentence adjudged by the court-martial and approved by the convening authority included a bad-conduct discharge, confinement for 179 days, and reduction to the lowest enlisted grade. The United States Air Force Court of Criminal Appeals affirmed. United States v. Adams, No. ACM 36226, 2007 CCA LEXIS 263, 2007 WL 2050718 (A.F. Ct. Crim. App. June 20, 2007) (unpublished).

On Appellant's petition, we granted review of the following issue:

WHETHER THE COURT-MARTIAL CONVENED BY SPECIAL ORDER AB-12 HAD PROPER JURISDICTION WHEN THAT ORDER DID NOT TRANSFER MEMBERS APPOINTED BY PRIOR ORDERS AB-01, AB-07, AND AB-09, BUT MEMBERS NAMED IN THOSE ORDERS NONETHELESS SAT AS MEMBERS OF APPELLANT'S COURT-MARTIAL.

For the reasons set forth below, we affirm the decision of the United States Air Force Court of Criminal Appeals.

I. COMPOSITION OF THE COURT-MARTIAL PANEL

1. Initial proceedings

At the outset of his trial, Appellant requested trial before a court-martial composed of officer and enlisted members. *See* Article 25(c)(1), UCMJ, 10 U.S.C. § 825(c)(1) (2000); Rule for Courts-Martial

(R.C.M.) 903(c)(1). Following the disposition of preliminary motions, the trial counsel provided the standard announcement of the composition of the court-martial, noting that the court-martial was convened by Special Order AB-01, as amended by Special Order AB-07 and Special Order AB-09. After accounting for members excused by the convening authority prior to assembly, the trial counsel identified the remaining nine members. The trial counsel administered the oath and the military judge announced that the court-martial was assembled. See R.C.M. 807.

2. The panel after voir dire and challenges

Following completion of voir dire and challenges, the following four members remained on the panel: Major (MAJ) RDH, Senior Master Sergeant (SMSgt) BJC, Master Sergeant (MSgt) MAB, and Tech Sergeant (TSgt) RDG. At that point, the panel composition fell below the minimum of five members required for a general court-martial quorum. See Article 16(1)(A), UCMJ, 10 U.S.C. § 816(1)(A) (2000); R.C.M. 805(b). The military judge called a recess so that new members could be detailed to the court-martial. See R.C.M. 505(c)(2)(B).

3. Proceedings after appointment of new members

The following morning, the military judge reconvened the court-martial for a session out of the presence of the members under Article 39(a), UCMJ, 10 U.S.C. § 839(a) (2000). He began by providing a detailed description of the procedural setting. First,

the military judge summarized the reasons for the changes in the composition of the panel:

> Counsel, I just wanted to put on the record just for continuity purposes, so that any reviewing authorities, should that become necessary, would know what's going on. After we busted quorum yesterday, we did, in fact, put the court in recess. We now have a new appointing order appointing additional members to the panel.

Next, the military judge described the procedure for addressing the voir dire, challenges, and the reading of charges, both with respect to the new members and the members previously selected:

> What we'll do is go ahead and bring in those new members. The members that have already previously been selected, those four members will not be present; it will just be the five new members that have been appointed. We'll go through the process of reading the general nature of the charges and going through the voir dire process. As I stated to counsel earlier, each side will still, in fact, have a peremptory challenge since this is a new group of members that did not go through the original bedding [sic] process there for the original voir dire.

Finally, the military judge provided the parties with an opportunity to object to the appointing order or the procedure that he had outlined:

> MJ: With that in mind, does anyone have an objection to the appointing order or the way that we are going to handle that?
>
> CDC: No, Your Honor.
>
> CTC: No, Your Honor.

The military judge then conducted the preliminary proceedings with the new members, as he had outlined to the parties. When the new members were brought into the courtroom, the military judge summarized the situation for the new members:

> The parties are present and some of the members are present. Members, just to give you an idea of what's going on, we began this process yesterday, at which time, we did what was called a busted quorum, which means we got some panel members seated, we went under the below core number which is five; therefore, we had to have an appointment of new members which is you. We're now going through the process to get you seated through the voir dire process.

The military judge next described what would transpire after voir dire:

> And once that's accomplished, we'll then call the other four members who have already been seated, and we'll combine you into one court, and then we'll bring you in and begin presentation of the evidence in this case.

At the request of the military judge, the trial counsel provided the following description of the orders convening the court-martial:

> This court-martial is convened by Special Order number AB-01 . . . as amended by Special Order number AB-07, . . . Special Order number AB-09, . . . and Special Order number AB-12 . . . .

Trial counsel then identified the following five members as present in the courtroom: Lieutenant Colonel (LTC) RDA, LTC CK, MAJ JWD, 1st Lieutenant (1LT) JLV, 1LT JAD. In accordance with the procedure outlined by the military judge, the trial counsel noted that the four members remaining from the initial proceedings were "absent."

Referring to his earlier remarks, the military judge observed that "the court has already been assembled and, therefore, this is partially reassembly of it at this time to go through the voir dire process and to give you some new instructions." The military judge provided the new members with the standard

preliminary instructions, and proceeded with voir dire of the new members. At the completion of voir dire and challenges, the military judge excused LTC RDA and 1LT JLV.

4. The panel after the second voir dire and challenges

When the full panel assembled together for the first time, the military judge announced, "For the record, we now have both attempts at panels combined and we now have the seven members that have been accepted by the court." Four of the seven members came from the original set of orders: MAJ RDH, SMSgt BJC, MSgt MAB, and TSgt RDG. The three remaining members were added during the proceedings after the recess: LTC CK, MAJ JWD, and 1LT JAD.

With seven members, including four enlisted members, the panel met the requirements of Article 16, UCMJ, for a general court-martial to consist of at least five members. The panel also met the requirements of Article 25, UCMJ, for the panel to consist of at least one-third enlisted members upon request of the accused. Subsequently, the trial proceeded to conclusion in the manner outlined by the military judge, with no objection by either party.

5. Consideration by the Court of Criminal Appeals

Appellant raised an issue regarding speedy trial before the Court of Criminal Appeals, but did not challenge the composition of the court-martial. The

court specified two issues, including the question now before us concerning the composition of the panel. *Adams*, 2007 CCA LEXIS 263, at *2, 2007 WL 2050718, at *1.

The Court of Criminal Appeals observed that Special Order AB-12 "seems to be a stand-alone order, convening an entirely new court-martial while failing to transfer the members named in the previous set of orders. . . ." *Id.* at *22, 2007 WL 2050718, at *9. The court also raised the issue of whether Appellant's court-martial had proper jurisdiction when the members appointed by the prior orders sat on Appellant's court-martial. Id. at *2, 2007 WL 2050718, at *1. The court noted that these members would be "interlopers" if they were not meant to be seated as members of the panel, creating a fatal jurisdictional defect. *Id.* at *23 n.5, 2007 WL 2050718, at *9 n.5. Likewise, failing to transfer the members named in the previous set of orders to Special Order AB-12 would have denied Appellant his right to be tried by a panel composed of at least one-third enlisted members. Id. at *23, 2007 WL 2050718, at *9.

The Court of Criminal Appeals first considered the language of Special Order AB-12, which stated: "[a] general court-martial is hereby convened. It may proceed at Ellsworth AFB, SD to try such persons as may be properly brought before it. The court will be constituted as follows . . . ." Id. at *9, 2007 WL 2070718, at *4. Special Order AB-12 then listed the names of five newly detailed members. The order also stated:

> All cases referred to the general court-martial convened by Special Order AB-1, this headquarters, dated 8 October 2004, as amended by Special Order AB-7, this headquarters, dated 24 November 2004, and Special Order AB-9, this headquarters, dated 8 December 2004, in which the court has been assembled, will be brought to trial before the court hereby convened.

The Court of Criminal Appeals next considered the record of trial and the intent of the convening authority, as reflected by the parties' actions at trial. *Id.* at *23-*26, 2007 WL 2050718, at *9. The court concluded that Special Order AB-12 was not issued to constitute an entirely new and distinct court-martial. *Id.* at *24, 2007 WL 2050718, at *9. Instead, the court determined that Special Order AB-12 was a third amending order, intended to bring the court-martial up to quorum, while preserving Appellant's right to trial by a panel of at least one-third enlisted members. *Id.* at *24, 2007 WL 2050718, at *9. The court observed that the convening authority issued Special Order AB-12 after quorum was broken. The lower court found that, "there is no doubt that everyone, including the defense, knew the five members named in Special Order AB-12 were additional members selected to bring the court back up to quorum and were not meant to constitute an entirely new and distinct court." *Id.* at *24, 2007 WL 2050718, at *9. Finally, the court noted, "[c]learly, there would be no reason

for the convening authority to suddenly start over with a new court after so much effort had already gone into reaching the point of adding a third set of members to this panel." *Id.* at *25, 2007 WL 2050718, at *9. The Court of Criminal Appeals concluded that the errors in the drafting of Special Order AB-12 were not prejudicial to Appellant. *Id.* at *26-*27, 2007 WL 2050718, at *10. The court affirmed the findings and sentence. *Id.* at *27, 2007 WL 2050718, at *11.

II. DISCUSSION

This Court's case law distinguishes between jurisdictional and administrative errors in the convening of a court-martial. Jurisdictional error occurs when a court-martial is not constituted in accordance with the UCMJ. *See United States v. Colon*, 6 M.J. 73, 74 (C.M.A. 1978). Jurisdiction depends upon a properly convened court, composed of qualified members chosen by a proper convening authority, and with charges properly referred. Article 25, UCMJ; R.C.M. 201(b); R.C.M. 503; R.C.M. 504; R.C.M. 505. A court-martial composed of members who are barred from participating by operation of law, or who were never detailed by the convening authority, is improperly constituted and the findings must be set aside as invalid. *See McClaughry v. Deming*, 186 U.S. 49, 63-65 (1902) (court-martial composed entirely of Regular Army officers in trial of a volunteer officer violated the Articles of War and was illegal); *United States v Harnish*, 12 C.M.A. 443, 31 C.M.R. 29 (1961) (individual who served on a court-martial without

appointment by the convening authority rendered the proceedings invalid).

Administrative errors in the drafting of a convening order are not necessarily fatal to jurisdiction, and may be tested for prejudice under Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2000). *See Colon*, 6 M.J. at 74-75 (court-martial conducted without the presence of four detailed members who had not been properly relieved was not jurisdictional error, but was prejudicial). In *United States v. Glover*, 15 M.J. 419, 422 (C.M.A. 1983), this Court found no prejudice to the accused where all parties believed the accused was at trial before a general court-martial, but the convening order convened a special court-martial. We have recognized that clerical mistakes are not necessarily prejudicial. See id. at 421; *United States v. Gebhart,* 34 M.J. 189, 192-93 (C.M.A. 1992).

In the present case, we find no jurisdictional defect in the composition of Appellant's court-martial. None of the seven members who participated in the court-martial was an "interloper." Each member was selected by the convening authority to consider these charges against this accused. There is no evidence that the convening authority excused any of the members who sat on Appellant's court-martial. *See* R.C.M. 505(c)(2)(A). There is also no evidence that the convening authority withdrew the charges in order to refer them to a new court-martial, as provided for in R.C.M. 604. More important, the record reflects that the five members named in Special Order AB-12

were selected to bring the court-martial up to quorum and were not selected to serve as a separately constituted court-martial. This purpose is underscored by the language of Special Order AB-12, which provided that "[a]ll cases referred to the general court-martial convened by Special Order AB-1 . . . as amended by Special Order AB-7 . . . and Special Order AB-9 . . . in which the court has been assembled, will be brought to trial before the court hereby convened." In that regard, we note that the convening authority appointed only officer members in Special Order AB-12 following proceedings in which the accused had elected trial before a panel that included enlisted members. Under these circumstances, the order served to bring the panel up to quorum. In short, the record of trial demonstrates that the errors in drafting Special Order AB-12 were administrative in nature, and that the errors did not materially prejudice the substantial right of the Appellant. See Article 59(a), UCMJ.

III. DECISION

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

ERDMANN, Judge, with whom RYAN, Judge joins (dissenting):

The power to convene courts-martial and to detail members to those courts-martial rests solely in those commanders that Congress, the President, or the Secretary concerned empowered to take those

actions. *See* Articles 22, 23, 24, 25, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 822, 823, 824, 825 (2000). A convening authority's actions create the structural basis of a courts-martial and when the plain language of the convening authority's order is clear, complete, and unambiguous, that order must be given effect. *See United States v. Wilson*, 65 M.J. 140, 141 (C.A.A.F. 2007). Because the language of Special Order (SO) AB-12 clearly and unambiguously convened a new court-martial to which none of the previously detailed court members were re-detailed, and because the composition of that newly created court-martial fell below a quorum and lacked enlisted membership as requested by Adams, the court-martial suffered a structural error which requires reversal.

There is no dispute as to the sequence and contents of convening orders in this case. The initial convening order, SO AB-01, convened a general court-martial and detailed ten officers to the panel. That order was properly amended by SO AB-7 which removed five officers and detailed five enlisted members. Then, SO AB-9 properly amended SO AB-01 relieving three members and naming three additional members. After voir dire only four members remained and the court-martial fell below quorum. The military judge recessed the court-martial and directed trial counsel to "get us a couple of names or three names there for potential new members, keeping in mind the numbers of officers and enlisted for the quorum[]." In response the convening authority issued SO AB-12 which, rather than amending SO AB-01, created a new court-

martial. The issue before the court is whether Adams was tried before a properly convened court.

"A court-martial is created by a convening order of the convening authority." Rule for Courts-Martial (R.C.M.) 504(a). The convening authority may change the members by order. R.C.M. 505(a). Before assembly of the court, the members may be changed without showing cause. R.C.M. 505(c)(1)(A). New members may be added after assembly "only when, as a result of excusals . . . the number of members of the court-martial is reduced below a quorum, or the number of enlisted members, when the accused has made a timely written request for enlisted members, is reduced below one-third of the total membership." R.C.M. 505(c)(2)(B).

Adams' court-martial had been sworn and assembled. Consequently, when the membership of Adams' original court-martial fell below a quorum as a result of challenges, new members could have been added to the court-martial convened by SO AB-01 just as the convening authority had done in SO AB-7 and SO AB-9.

That is not, however, what SO AB-12 does. Rather than detailing new members to a previously convened court-martial, SO AB-12 very plainly "convened" a general court-martial. SO AB-12 has all the required attributes of an order creating a court-martial: it designates the type of court-martial and details members. The order detailed five members to the general court-martial, the precise number necessary to constitute a general court-martial. *See*

Article 16(1)(A), UCMJ, § 10 U.S.C. 816(1)(A) (2000). This convening order stands in stark contrast to an order that merely adds members to a previously convened court-martial. Notably, this record reflects two prior, proper amending orders detailing new members to the court convened by SO AB-01. These amending orders reflect that the convening authority knew how to add members and support the plain reading of SO AB-12 that something entirely different was intended by that order.

There is other language in SO AB-12 that plainly indicates the creation of a new court-martial. The order states:

> All cases referred to the general court-martial convened by Special Order AB-1, this headquarters, dated 8 October 2004, as amended by Special Order AB-7, this headquarters, dated 24 November 2004, and Special Order AB-9, this headquarters, dated 8 December 2004, in which the court has been assembled, will be brought to trial before the court hereby convened.

Facially this language withdraws the charges from the court-martial convened by SO AB-01 (as amended) and re-refers them to the court-martial created by SO AB-12. Cha ges may be withdrawn from a court-martial for any reason at any time before findings are announced. R.C.M. 604(a). Withdrawn charges upon which no evidence has been introduced at the initial court-martial may be

referred to another court-martial unless withdrawal was for an improper reason. R.C.M. 604(b). In this instance the apparent reason for withdrawal and re-referral is to establish a quorum -- a proper reason. In addition, the withdrawal and re-referral are consistent with the trial proceedings and the express need to have a quorum. "[W]hen the plain language of the convening authority's action [or order] is facially complete and unambiguous, its meaning must be given effect." *Wilson*, 65 M.J. at 141. Put simply, an unambiguous convening order means precisely what it says.

United States v. Mack, 58 M.J. 413 (C.A.A.F. 2003), reflects a three-step process for reviewing convening orders and determining whether members were properly detailed to a given court-martial:

> [1] When the convening orders and the record make it clear that an individual who served on a court-martial panel was never detailed to do so, we have held that the court-martial was improperly constituted and the findings must be set aside. *United States v. Harnish*, 12 C.M.A. 443, 31 C.M.R. 29 (1961). [2] When the record reflects an ambiguity as to whether an individual was detailed to serve at a particular court-martial, we look to the intent of the convening authority with respect to service of that member on that court-martial panel. *United States v. Padilla*, 1 C.M.A. 603, 5 C.M.R. 31, (C.M.A. 1952). [3] When there

> is an ambiguity but no evidence that the convening authority's intent was to the contrary, "the construction of the convening orders by the participants of [the] trial is controlling." *United States v. Gebhart,* 34 M.J. 189, 193 (C.M.A. 1992).

Id. at 416. Applying a similar analysis here confirms that this court-martial was defective. In Adams' case, there is no ambiguity. SO AB-12 is perfectly clear with respect to which members were detailed to serve on the court-martial created by that order. Those individuals who previously remained from SO AB-01, as amended by SO AB-7 and SO AB-9, were never detailed to the court-martial convened by SO AB-12. When the membership of the court-martial created by SO AB-12 fell below five properly detailed members and when persons not detailed to that court sat in judgment of Adams, this court-martial was not properly constituted and reversal is required.

The majority places great weight upon *United States v. Glover,* 15 M.J. 419 (C.M.A. 1983), to affirm this case on the basis of administrative error in the preparation of court-martial convening orders. In my view, to the extent that *Glover* means that clear and unambiguous language in a convening order can be ignored, that case should be overruled. As applied in this case, Glover elevates erroneous interpretations by individuals other than the convening authority over the clear expression of the convening authority. As a result, it condones inattention and sloppy

administration in military justice. There is nothing in the language of SO AB-12 that is improper, unlawful or ambiguous. Facially, SO AB-12 addressed and rectified the lack of a quorum. There is no justification for looking beyond the face of SO AB-12 itself, and there is no reason not to give the words of the convening authority their ordinary and plain meaning. This court-martial lacked a properly detailed quorum and contained interlopers. I therefore dissent.

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS
UNITED STATES
v.
Airman ANTONYO T. ADAMS
United States Air Force
ACM 36226

20 June 2007, Decided

COUNSEL: For Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Anthony D. Ortiz.

For the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, Major Michelle M. McCluer, Major Amy E. Hutchens, Captain Donna S. Rueppell, and Captain Daniel J. Breen.

JUDGES: Before BROWN, FRANCIS and SOYBEL Appellate Military Judges. Chief Judge BROWN participated in this decision prior to his retirement.

OPINION BY: SOYBEL

OPINION

OPINION OF THE COURT

SOYBEL, Judge

The appellant pled not guilty to all charges and specifications. Appellant was convicted of being absent without leave under Article 86, UCMJ, 10 U.S.C. § 886, and of three specifications of dishonorably failing to maintain sufficient funds for payment of checks under Article 134, UCMJ, 10 U.S.C. § 934. He was found not guilty of rape under Article 120, UCMJ, 10 U.S.C. § 920, and of wrongful use of marijuana under Article 112a, UCMJ, 10 U.S.C. § 912a. His adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 179 days, and reduction to E-1.

The appellant asserts one error for our review: Whether the military judge erred in denying the appellant's motion to dismiss all charges and specifications for denial of his right to speedy trial under Article 10, UCMJ, 10 U.S.C. § 810, and the Fifth and Sixth Amendments to the United States Constitution. After reviewing the entire record, this Court specified two issues: (1) Whether Master Sergeant (MSgt) R, appointed by Special Order AB-07, was properly excused from the court-martial and if he was not, whether the court was properly convened; (2) Whether the court-martial convened by Special Order AB-12 had proper jurisdiction when that order did not transfer members appointed by prior orders AB-01, AB-07, and AB-09, but members named in those orders nonetheless sat as members of the appellant's court-martial. Finding no error prejudicial to the appellant, we affirm.

Background Regarding the Speedy Trial Issue

The military judge made extensive and detailed findings of fact that we accept under the clearly erroneous standard adopted by our superior court in *United States v. Doty*, 51 M.J. 464, 466 (C.A.A.F. 1999) (quoting *United States v. Taylor*, 487 U.S. 326, 337 (1988)).

On 5 March 2004, the appellant was notified that because of a pattern of minor disciplinary infractions, he had been selected for involuntary separation with an honorable discharge before the expiration of his normal term of service under the Air Force, Force-Shaping Program. This was known as a "rollback" action, and his date of separation was set for 5 June 2004.

Just four days after his notification, the Air Force Office of Special Investigations (OSI) at Ellsworth Air Force Base (AFB), South Dakota, became aware of Airman (Amn) F"s rape allegation against the appellant. According to Amn F, the rape occurred almost a year before she reported it to authorities. The OSI immediately opened an investigation and interviewed the appellant and Amn F that same day. The accused waived his right to remain silent and provided a statement to the OSI.

Over the course of the next few days, the OSI conducted an investigation that included a records review, a pretext phone call to the appellant, witness interviews, and attempts to locate other pertinent

witnesses. Because of the late reporting of the allegation, the OSI conducted neither a rape protocol examination nor crime scene investigation. The trial court found "for all practical purposes, that the OSI completed [its] investigation on or about 11 March [20]04, within two days of the date [it] opened the investigation."

The military judge also found that "for some inexplicable reasons, the [report of investigation] was not rendered [to the legal office] until 13 May [20]04, some two months later." From 13 May 2004 to 5 August 2004, the legal office conducted one interview with Amn F to ascertain she was interested in pursuing the case. Other than very limited discussions with the trial defense counsel about scheduling a hearing pursuant to Article 32, UCMJ, 10 U.S.C. § 832, the case essentially sat idle during this period.

However, during this period of apparent government inactivity, things were happening with the appellant. He received a no contact order regarding Amn F and was reassigned to a new work section to avoid working in the same duty section with her. Starting on 1 August 2004 and continuing for several pay periods, the appellant received paychecks of less than $50.00 because the government was recouping excess money it had paid him during the preceding four months. On 1 June 2004, the appellant was placed on administrative hold, which required legal office coordination before he was allowed to go on temporary duty, take leave, or be reassigned to another base. Also, on 1 June

2004, the appellant's rollback action was cancelled and his original 21 October 2006 separation date was reestablished.

Between 9 March 2004 and 29 November 2004, the appellant expressed anxiety and frustration over the length of time his case was taking to move forward. Through his own observations, the appellant's first sergeant determined the appellant's stress level was high enough to warrant a visit to the counselors at Life Skills[1] office. This visit was not command directed, but rather borne out of the first sergeant's concern for the appellant's well being.

By 31 July 2004, almost five months after the OSI completed its investigation, the appellant's area defense counsel (ADC) was reassigned without an agreement in place on a date to conduct an investigation pursuant to Article 32, UCMJ. The military judge found that the failure to initiate a hearing pursuant to Article 32, UCMJ, was due to inaction on the part of the government.

On 2 August 2004, the appellant failed to report for duty. Three days later he was located on an Indian Reservation where he had traveled with a member of the local tribe. The appellant was held in civilian custody until he was returned to Ellsworth AFB, South Dakota, on 6 August 2004 and placed in pretrial confinement. The pretrial confinement hearing was held on 9 August 2004 and, due to a gap in ADC coverage at Ellsworth AFB, the ADC from

---

[1] "Life Skills" refers to the mental health counseling services offered by the Air Force.

Mountain Home AFB, Idaho represented the appellant at that hearing, by phone.

A hearing pursuant to Article 32, UCMJ, was initially scheduled for 9 September 2004 but, at the government's request, was delayed for two weeks due to the discovery of the appellant's alleged bad checks. The government was also aware of a positive urinalysis result for marijuana from a sample collected upon the appellant's return to military control on 6 August 2004. The appellant's ADC did not object to the date of the Article 32, UCMJ, investigation but did submit a request for a speedy trial on 10 September 2004. Charges were preferred on 22 September 2004. The Article 32, UCMJ, hearing was held on 23 September 2004, and the report was completed on 28 September 2004. The charges were served on the appellant on 13 October 2004. After a docketing conference, trial was set for 30 November 2004. The military judge excluded the period between 8 October and 30 November 2004 from the calculation of days used to determine compliance with Rule for Court Martial (R.C.M.) 707.

Meanwhile, on 7 October 2004, the defense requested an expert consultant in the area of forensic psychology. Due to avoidable problems on the government's side, an expert was not appointed and engaged with the defense until the week of 6-10 December 2004. Because of this delay, trial on the merits did not begin until 13 December 2004, although the appellant was arraigned at a session held on 29 November 2004.

Background Regarding the Specified Issues

The court was convened through the promulgation of four special orders. The first order, AB-01, issued on 8 October 2004, appointed ten officers to comprise the court-martial. On 24 November 2004, Special Order AB-07 relieved five of the original officers and appointed five enlisted members. Two of these enlisted members were MSgt R and MSgt B. Two weeks later, on 8 December 2004, Special Order AB-09 relieved MSgt B and two others, a major and a senior master sergeant, but not MSgt R. Additionally, Special Order AB-09 appointed an additional officer and two enlisted members. At trial, the first time the members were brought into the court, the trial counsel announced ten names; MSgt B, who was relieved in AB-09, was one of the names the trial counsel announced as being present. MSgt R, who was not relieved in any of the special orders, was not announced as being present and, in fact, was not present. After the trial counsel announced the names, the following exchange occurred between the military judge and trial counsel:

> MJ: Captain, is there a Sergeant [B] here?
>
> TC: Your Honor, Master Sergeant [B] is absent.
>
> MJ: And he's absent because he was relieved. Is that correct?

> TC: Master Sergeant [R], I believe, was excused, Your Honor, as was Master Sergeant
> [B].
>
> MJ: Now counsel, you've thoroughly confused me. How many members are supposed to be here now?
>
> TC: Nine, Your Honor.
>
> MJ: And everyone like [B], all of them have properly been relieved by the convening authority. Is that correct?
>
> TC: Yes, your honor

After this exchange took place the members were sworn and the military judge announced the court was assembled. MSgt B and MSgt R were not present. There was no objection from the trial defense counsel regarding the composition of the court.

During voir dire, the number of panel members fell to four; one officer and three enlisted members. At that point, Special Order AB-12, dated 15 December 2004, was promulgated. Unlike the two previous orders, which relieved certain members and detailed new members to the "general court-martial convened by Special Order AB-01," AB-12 purportedly convened an entirely new court-martial. It read: "A general court-martial is hereby convened.

It may proceed at Ellsworth AFB, to try such persons as may be properly brought before it. The court will be constituted as follows . . ." The order then listed the names of five newly detailed members before going on to read:

> All cases referred to the general court-martial convened by Special Order AB-1, this headquarters, dated 8 October 2004, as amended by Special Order AB-7, this headquarters, dated 24 November 2004, and Special Order AB-9, this headquarters, dated 8 December 2004, in which the court has been assembled, will be brought to trial before the court hereby convened.

Despite the plain language of Special Order AB-12, it was clear that the trial participants considered the members named in that special order to be additional members to the partially assembled quorum rather than a separately constituted court. After quorum was broken and Special Order AB-12 was received from the convening authority, the military judge said, "We now have a new appointing order appointing new members to the panel." He went on to say they would voir dire the five new members outside the presence of the members who had "already previously been selected." After the newly named members underwent voir dire, they joined the four members remaining from the previous orders to make up the appellant's court-martial panel.

Speedy Trial

We review speedy trial issues de novo. *United States v. Proctor*, 58 M.J. 792, 704 (A.F. Ct. Crim. App. 2003); *United States v. Cooper*, 58 M.J. 54, 57 (C.A.A.F. 2003); *Doty*, 51 M.J. at 465. While doing so we give substantial deference to the trial judge's findings of fact and will not overturn them unless they are clearly erroneous. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.F.F. 2005); *Proctor*, 58 M.J. at 795.

Several authorities give rise to an accused's right to a speedy trial. This right has been recognized under the Fifth and Sixth Amendments to the U.S. Constitution; Article 10, UCMJ; Rule for Courts-Martial (R.C.M.) 707; and case law. *United States v. Vogan*, 35 M.J. 32, 33 (C.M.A. 1992). Appellant has raised the issue under three of these authorities.[2]

Fifth Amendment

The Fifth Amendment's Due Process Clause has been recognized by the Supreme Court as protecting an accused from egregious pretrial delays caused by the government. *United States v. Lovasco*, 431 U.S. 783 (1977); *Vogan*, 35 M.J. at 34. In *Lovasco*, a trial for mail fraud and weapons charges, more than eighteen months elapsed between the commission of the offenses and indictment. *Lovasco*, 431 U.S. at

---

[2] The appellant has not raised the 120-day rule under R.C.M. 707, nor do we perceive a violation of that rule.

784. During that time, two witnesses the appellant claimed were material to his defense died. *Id.* at 785.

Despite the apparent setback for the defense in *Lovasco*, this is an area of the law where the government is given much latitude in deciding the speed at which it prosecutes a case. *Id.* at 795. In denying the appellant's Fifth Amendment challenge to the charges, the Supreme Court held that judges, in defining due process, are not allowed to substitute their own "personal and private notions of fairness" for the "prosecutor's judgment as to when to seek an indictment." *Id.* at 790 (quoting *Rochin v. California*, 342 U.S. 165, 170 (1952)). The Court looked at the case as a whole and decided that the extent of prejudice to the appellant's case, notwithstanding his assertions about the materiality of the two witnesses, was not very severe. *Id.* at 796. The Court also saw no bad faith on the part of the government and refused to craft a rule that required the government to proceed to trial as soon as it had enough evidence to establish probable cause. *Id.* at 796-97.

In *Lovasco*, the Court discussed many valid reasons why the government might wait before formally bringing charges even though it possessed enough information to establish probable cause. *Id.* at 797 n.19. Several of these reasons would benefit the accused. *Id.* Finally, the Court recognized that statutes of limitation provide the "primary guarantee against bringing overly stale criminal charges." *Id.* at 789 (citing *United States v. Marion*, 404 U.S. 307, 322 (1971)). In short, the Court said

that the government is free to exercise its judgment in deciding when to bring charges against an individual, and, unless bad faith or substantial prejudice to the defense's case is evident, the government's judgment will not be disturbed. *Id.* at 783. *See also United States v. Reed*, 41 M.J. 449 (C.A.A.F. 1995), which instructs that not only is the length of the delay important, but the reason for the delay must also be examined in a Fifth Amendment speedy trial test. The appellant has the burden of proof regarding these two prongs. Mere speculation or conjecture will not suffice. *Id.* at 452.

In this case, one of the appellant's chief complaints focuses on the initial four-month delay, during which the government only accomplished a week or two of actual work. Even though the military judge found this delay to be "egregious," he did not find it violated the Fifth Amendment. We agree. While the government could have, and should have, moved at a quicker pace, there was no evidence it stalled the investigative progress to gain some tactical advantage over the appellant. Nor did the delay "impair the ability to mount a defense." *Vogan*, 35 M.J. at 34 (citing *Lovasco*, 431 U.S. at 795 n.17).

In fact, some of the prejudices the appellant claims he suffered because of the delay were things totally within his control. We will not assign blame to the government because the appellant wrote bad checks and went AWOL between the time the OSI first opened its case and the time the government formally charged him. While we agree that 132 days

in pretrial confinement can be prejudicial in some situations, that fact alone, without evidence of harsh or oppressive conditions, or some actual prejudice to the appellant's case, does not constitute a violation of the appellant's "substantial rights." *Mizgala*, 61 M.J. at 129.[3]

Sixth Amendment

Application of the Sixth Amendment speedy trial right is triggered at indictment or restrained by arrest and detention. *Lovasco*, 431 U.S. at 788 (citing *Marion*, 404 U.S. 307). The military equivalent to indictment is the bringing of a formal charge. *Vogan*, 35 M.J. at 33; *United States v. Nichols*, 42 M.J. 715, 719 (A.F. Ct. Crim. App. 1995). Delays occurring before preferral are irrelevant for Sixth Amendment speedy trial purposes. *Lavasco*, 431 U.S. at 788. The Supreme Court established the test for Sixth Amendment speedy trial violations in the case of *Barker v. Wingo*, 407 U.S. 514 (1972). In applying this four-part test, we look at the length of the delay in bringing the appellant to trial, the reasons for the delay, whether the appellant asserted his right to a speedy trial prior to trial, and the extent of any prejudice to the appellant. *Barker*, 407 U.S. at 530. *See also United States v. Becker*, 53 M.J. 229, 233 (C.A.A.F 2000); *Proctor*, 58 M.J. at 797-98.

Here, just over two months elapsed between preferral and the appellant's arraignment, which occurred on 29 November 2004 at the first session of

---

[3] While *Mizgala* addresses concerns related to Article 10, UCMJ, the pretrial confinement analysis is equally applicable for a discussion of the Fifth Amendment.

the trial. Then, because of problems obtaining a defense requested expert, the trial did not begin in earnest until 13 December 2004, two weeks and a day after arraignment and just less than three months after preferral. We do not find this delay to be excessive or prejudicial to the appellant.

For the second prong of the *Barker* test, a combination of factors caused the delay: scheduling the Article 32, UCMJ, hearing while accommodating the new ADC's upcoming temporary duty assignment; discovering additional charges; difficulty finding a mutually agreeable trial date; and the government's month-plus attempt to provide the appellant with a suitable expert witness. Although the government's attempt to find the requested expert was poorly executed and added a month to the pretrial delay, there was no indication the government deliberately tried to delay the trial to gain an advantage over the appellant. Negligence or even overcrowded courts were noted by the Supreme Court as among more "neutral" reasons that are weighted less heavily against the government when deciding this issue. *Barker*, 407 U.S. at 531. The month delay in finding an expert for the defense was caused by a conflict of interest between the first proposed expert and his supervisor, but there certainly was no bad faith shown on the government's part in making the initial selection. In that sense, this is a more neutral reason for the delay.

For the third prong of the test, the appellant asserted a demand for a speedy trial on 10

September 2004. However, three weeks later he made his request for an expert consultant in the area of forensic psychology. Even though the military judge was right in criticizing the government for taking more than 30 days to find an expert for the appellant, we must expect some delay in getting to trial while this request was being worked.

Finally, other than spending 134 days in pretrial confinement, the appellant has shown no prejudice to his ability to defend himself at trial because of the delay.[4] Under *Barker*, impairment of the defendant's ability to defend himself is the most important harm the right to a speedy trial seeks to prevent. *Id.* In that case, trial was delayed five years but with no prejudice to the appellant's ability to defend himself. In this case, no evidence or witnesses helpful to the appellant were lost, nor did the appellant identify any other prejudice to his ability to defend himself.

Applying the four-part test enunciated by the Supreme Court in *Barker*, there is not sufficient reason to warrant dismissal of all charges and specifications under the Sixth Amendment Speedy Trial Clause, despite the government's sometimes sluggish pace in prosecuting this case. Considering the length of the delay, the reasons for it, the timing of the appellant's demand for a speedy trial, and the fact that the delay did not prejudice the appellant's ability to defend himself, we find the appellant's

---

[4] The appellant in *Barker* spent ten months in jail before posting a $5,000 bond to obtain his release. *Barker*, 407 U.S. at 517.

rights under the Sixth Amendment were not violated.

Article 10, UCMJ

Article 10, UCMJ, is triggered when a service member is placed under pretrial arrest or in confinement. From that point on, the government is compelled to take "immediate steps" to either "try him or to dismiss the charges and release him." "The test for compliance with the requirements of Article 10 [UCMJ] is whether the government acted with 'reasonable diligence.'" *Proctor*, 58 M.J. at 798 (citing *United States v. Birge*, 52 M.J. 209, 211 (C.A.A.F. 1999)). *See also United States v. Benavides*, 57 M.J. 550, 551 (A.F. Ct. Crim. App. 2002); *United States v. Kossman*, 38 M.J. 258, 261 (C.M.A. 1993). Our superior court has often said it does "not demand 'constant motion [from the government], but reasonable diligence in bringing the charges to trial.'" *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F 2007) (quoting *Mizgala*, 61 M.J. at 127); *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965). Each of these prior cases maintains that while Article 10, UCMJ, provides greater rights than does the Speedy Trial Clause of the Sixth Amendment, the four-part test set out in *Barker* is a proper analytical tool for deciding Article 10, UCMJ, issues.

In this case, even though the OSI opened an investigation against appellant in March of 2004, the protections of Article 10, UCMJ, were not triggered until the appellant was apprehended and placed in

pretrial confinement on 6 August 2004. Approximately one week later, the legal office was first notified of the possible financial misconduct committed by appellant. It also learned of his positive urinalysis results.

Due to the temporary duty schedule of the appellant's defense counsel, an investigation pursuant to Article 32, UCMJ, could not be scheduled until 9 September 2004. In the week before the scheduled investigation, the government received evidence concerning the bad check offenses for the first time and asked for a postponement of the investigation until 23 September 2004. The report from the investigation was completed within five days and forwarded to the convening authority. Charges were referred to trial within ten days of the report's receipt by the convening authority. The government worked the case continuously throughout October 2004, conducting witness interviews, issuing subpoenas and consulting with personnel at the Air Force drug testing laboratory. Because the parties could not agree on a trial date, a military judge set trial for 30 November 2004. This date took into account proposed dates from each side as well as the availability of a government expert witness.

During the month of October 2004, the government also tried to find a suitable expert witness to fulfill a request by the defense. It took almost 30 days to find one, though it probably should have taken less than a week. The military judge

placed the blame for the loss of this time on the government.

During the month of November 2004, the government continued with its case preparation and responded to discovery requests. The appellant was arraigned on 29 November 2004, and trial on the merits began 14 December 2004. The defense's expert witness needed a week of that intervening time to work with the defense and prepare for trial. In all, the appellant spent 134 days in pretrial confinement.

We agree with the military judge that during this time the government exercised due diligence. Even the government's excessive time obtaining an expert for the defense does not change the overall assessment of government conduct during this period. Given the other pretrial work that was still ongoing during this delay and the fact that the trial date, which had already been set for 30 November 2004, precluded "any likely earlier action," we agree with the military judge that the delay should "not change the court's assessment of [the government's] conduct as a whole."

Composition of the Court-Martial Panel

Court Member MSgt R's absence

Government appellate counsel argues that MSgt R's excusal was properly announced on the record in conformity with R.C.M. 505(b), so the fact that the convening authority did not relieve him in any of the

four special orders promulgated for this court is of no consequence. Indeed, R.C.M. 505(b) does say that "[a]n order changing the members of the court-martial, except one which excuses members without replacement, shall be reduced to writing before authentication of the record of trial." Government appellate counsel's position relies on the trial counsel's exchange with the military judge noted above.

The problem with this position is that we have absolutely no idea whether MSgt R was excused "without replacement." Inherent in the government's position is the underlying rationale that since MSgt R's excusal was not reduced to writing, it had to be "without replacement." Trial counsel did not say this was the case when he announced MSgt R's excusal in court, and, given the hazy nature of the exchange between trial counsel and the military judge, we are not confident MSgt R's excusal did not need to be reduced to writing. Besides, Air Force Instruction (AFI) 51-201, *Administration of Military Justice,* ¶ 5.8.1 (26 Nov 2003), tells practitioners to "[a]void oral amendments, unless absolutely necessary, and ensure they are confirmed by written orders." This instruction was not followed here. Of course, this entire issue could easily have been resolved with an affidavit from the convening authority or staff judge advocate stating that MSgt R was in fact excused. None was provided.

Failure to transfer members

Another problem with the convening orders in this case is that Special Order AB-12 seems to be a stand-alone order, convening an entirely new court-martial while failing to transfer the members named in the previous orders to the new panel. Intentionally not having those members named in the previous sets of orders transferred to Special Order AB-12, but nonetheless having them sit on the panel hearing the appellant's case would make them "interlopers" on the court.[5] Intentionally failing to transfer them to Special Order AB-12 would also have denied the appellant his right to be tried by a panel composed of at least one-third enlisted members as he requested. Both of these situations would have been fatal defects.

It is easy to see from the record what was intended during member selection and the special order creation process of this court. AFI 51-201, ¶ 5.8.1 provides: "[g]enerally, issue no more than two amendments to the original order. If it is necessary to further amend the convening order, publish a new order convening the court-martial and transfer all cases in which the court has not yet been assembled to the new order." Since Special Order AB-12 would have been the third amendment, the legal office apparently tried to comply with AFI 51-201 by

---

[5] If the four previously selected members were not meant to be seated as members of the panel, they would havebeen deemed "interlopers" creating a fatal jurisdictional defect for this court. *United States v. Peden*, 52 M.J. 622, 624 (Army Ct. Crim. App. 1999).

publishing a new order. In doing so, it neglected to name the previously selected members, making it appear they were no longer detailed to the court. However, there is no doubt everyone, including the defense, knew the five members named in Special Order AB-12 were additional members selected to bring the court back up to quorum and were not meant to constitute an entirely new and distinct court.

This case is similar to *United States v. Gebhart,* not only in the number of errors associated with creating the special orders, but also in the type of errors. *United States v. Gebhart*, 34 M.J. 189 (C.M.A. 1992). There, one enlisted member who was detailed and relieved in the same order sat as a member of the panel while another member who was detailed to the court failed to appear with no explanation, much like our MSgt R. Also, an amending order in *Gebhart* referred back to a court-martial convening order that was not associated with that case. Finally, the amending order itself was signed by the wrong person. Our superior court was displeased enough with these errors to refer to the administration of the court-martial orders in *Gebhart* as "slipshod." Yet despite all of the case's problems, the Court did not find a jurisdictional error. *Id.* at 192.

A court-martial convening order is merely an "expression of the intent of the convening authority. . . . [i]f the document does not accurately reflect the convening authority's intent, it is the fault of the document's author, not the convening authority."

United States v. Glover, 15 M.J. 419, 421 (C.M.A. 1983). *Glover* and *Gebhart* both instruct that we should look to the conduct of the parties involved in the court-martial to see what their understanding was of the convening authority's intent. *Id.*; *Gebhart*, 34 M.J. at 189. Here there is no question all parties considered Special Order AB-12 a third amending order and not an order constituting a new court. Clearly, there would be no reason for the convening authority to suddenly start over with a new court after so much effort had already gone into reaching the point of adding a third set of members to this panel. Plainly, the convening authority's intent was to appoint new members to the partially formed court in order to bring it up to quorum, while preserving the appellant's right to trial by a panel of at least one-third enlisted members. Finally, the military judge asked if there was any objection to the orders or the way they were going to handle the addition of the new members. There was none by either side.

Regarding the missing MSgt R, his absence does not create a jurisdictional flaw requiring reversal. In *United States v. Cook*, our superior court looked at a case where the staff judge advocate, who was delegated authority to excuse members from a court-martial, exceeded his authority and excused more than one-third of the detailed members. *United States v. Cook*, 48 M.J. 434 (C.A.A.F. 1998). Thus, like in the instant case, at least one member who was absent should have been present and sitting on the panel. In *Cook* as in this case, the court checked if there was an objection by the defense, and there

was none. *Id.* at 436. More importantly, the Court found the error caused no prejudice to the appellant. Like in *Cook*, not only was there was no objection to the court's composition in this case, there was also no argument put forth that the appellant was prejudiced by the empanelling process irregularities, and there is nothing in the record to suggest any prejudice occurred. *Id.* In fact, the military judge in the case now under review very liberally granted the appellant's challenges for cause, and we see no realistic possibility that the errors that did occur prejudiced the appellant.

Finally, in *Gebhart* the Court looked to see if, in the end, the appellant still received a fair trial. *Gebhart*, 34 M.J. at 193. We apply the same standard here. Despite the administrative errors that occurred in this case, we find the appellant was not prejudiced by these mistakes and received a fair trial. However, we advise military legal practitioners that a clear situational awareness regarding the status of court members and a strict attention to detail regarding the convening orders and amendments are basic proficiencies that we expect even the most inexperienced counsel to demonstrate.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.